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No. 124

# In the
# Supreme Court of the United States
## October Term, 1951

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Boeing Airplane Company, a corporation, *Petitioner*,

vs.

Aeronautical Industrial District Lodge No. 751 of the International Association of Machinists, a labor organization; and International Association of Machinists, a labor organization, *Respondents*.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Argus Press, Seattle

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This is a reply brief and in it we shall endeavor to deal, as concisely as possible, with the specific matters in respondents' brief which seem in greatest need of correction.

### As to the Conflict of Decision

In essence, respondents' brief concedes that if the strike can be regarded as a *repudiation* of the Agreement (rather than, as they contend, merely a *material breach* of it) then a conflict does exist between the decision of the lower court and decisions of the Supreme Court of the State of Washington.

But, state respondents, no such conflict can exist because the strike cannot possibly be regarded as a repudiation of the Agreement.

Assuming, arguendo, that a distinction exists between the remedies available to the innocent party in the event of a material breach as against those available in the event of a repudiation, the assertion that the strike was not in repudiation of the Agreement simply cannot survive scrutiny.

We can conceive of no better example of a repudiation than a strike which, as here, was in complete disregard of a no-strike provision, lasted for approximately five months, *and began immediately after a union ultimatum to the employer either to accede at once to a new agreement "or else."*

But respondents nevertheless continue to press the theory (which finds no support in any recognized principle of law) (a) that the innocent party to a contract can terminate and sue only where the contract is repudiated but not where it is materially breached, (b) that the word "terminated" must therefore necessarily be read as "rescinded" in the Boeing letter of April 22, 1948, because, they argue, Boeing did not have the right to terminate and sue, and (c) that in the absence of a repudiation no conflict exists between the lower court decision and the Washington decisions which admittedly recognize the right to terminate and sue where a repudiation has occurred.

Moreover, the Washington decisions make no such distinction between a material breach and a repudiation, and the fallacy of the argument that the word "terminated" must be read as "rescinded" becomes doubly apparent when it is remembered that, just prior to de-

livery of the letter, respondents were advised that the Agreement would be enforced and that, just after delivery of the letter, respondents were advised orally, and also by the prompt institution of this action, of Boeing's unvarying claim for damages for breach of the Agreement.

And again, the argument that the letter must be regarded not as a termination but as a rescission, on the basis of a Washington decision of 41 years ago (*Beltinck v. Tacoma Theater Co.*, 61 Wash. 132, 111 Pac. 1045 (1910)) discussed in petitioner's brief at page 30, in which the vital differences between the legal consequences flowing from a termination of a contract—as against those flowing from a rescission of it—were in no way involved or even considered by the Washington court, is completely without merit. Also, it ignores entirely the several later Washington cases mentioned in petitioner's brief (pages 19, 25 and 27) where these vital differences were considered and recognized by the Washington court to be as stated in petitioner's brief.

These basic fallacies underlie the whole of respondents' argument on the matter of conflict of decisions.

**As to Review of Concurrent Findings of Lower Courts**

Respondents rely heavily on the rule stated by this court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1948) and other cases cited on page 9 of their brief to the effect that this court will

not undertake to review concurrent *findings of fact* by two courts below in the absence of a very obvious and exceptional showing of error. Such rule can have no possible application here. There are no findings of fact involved inasmuch as the parties have stipulated in writing (R. 637-638) that the legal effect of the letter, upon which this appeal turns, shall be determined solely as a matter of law. And even without such a stipulation, the result is the same because the construction and effect of a written instrument is a question of law. *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281, 289 (1917); *State v. Comer,* 176 Wash. 257, 266, 28 P.2d 1027, 1031 (1934); *Drainage District No. 1 v. Rude,* 21 F.2d 257, 262 (CA-8, 1927).

**As to the Importance of the Question Presented**

Respondents further urge this court to view the question involved as one devoid of general importance. On this, they argue that the question is so strictly limited to unique facts of record that it is unworthy of review.

A reference to the language of the lower court is alone sufficient to dispel any such notion. To quote the Court of Appeals (R. 1348):

> "The power of *termination* which accrues to the wronged party as a result of such a breach and was exercised by Boeing in this case *is* a right of *rescission* which leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract." (Italics added.)

It is thus the law of the lower court decision that where a collective bargaining agreement containing no-strike and union shop provisions is in full force and effect, and where that agreement is breached by a strike which constitutes a material breach of the agreement to the employer's great detriment, then the "power of termination" which accrues to the employer is a "right of rescission" which leaves neither party with any basis thereafter to complain of the conduct of the other.

*This sweeping and drastic conclusion is in no way predicated on any unique facts of record.*

In other words, according to the lower court, *any* employer faced with a breach of a no-strike provision, contained in a union shop collective bargaining agreement, can do one of two things, only: (1) continue full performance of employer's obligations under the agreement despite the continuing breach by the union, and then consider attempting to recover damages whenever the striking union decides to end the strike, or (2) terminate, *and thus automatically rescind,* the agreement. Boiled down, this means that *no* employer confronted with a strike in violation and repudiation of such a collective bargaining agreement, can lawfully attempt to activate the struck plant, free of union shop provisions and other obligations of the breached agreement, without forfeiting all right of action against the striking union for damages flowing from the breach.

It is inescapable that the question presented is one of great interest and concern to all employers and to all labor organizations and is clearly one of general and paramount importance.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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